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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1301.

ANTHONY J. LANGDON AND MICHAEL J. LANGDON,
PLAINTIFFS IN ERROR,

vs.

WILLIS M. SHERWOOD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED NOVEMBER 15, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 16, 1887.

1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judical circuit, sitting in the circuit court of the United States for said district of Nebraska, at the term of May, A. D. 1887.

Be it remembered that on the 18th day of August, 1883, a petition was filed in the office of the clerk of said circuit court, which said petition is in words and figures following, to wit:

Petition.

In the Circuit Court of the United States, District of Nebraska.

WILLIS M. SHERWOOD, Plaintiff,

vs.

ANTHONY J. LANGDON and MICHAEL J. LANGDON, Defendants.

The plaintiff, for cause of action, says he is a resident and citizen of the State of Missouri and each of the defendants is a resident and citizen of the State of Nebraska; that the matter in dispute herein, to wit, the real estate hereinafter described, is of the value of five hundred dollars, exclusive of costs, said real estate being in fact worth the sum of ten thousand dollars.

Plaintiff further says he is the owner in fee simple absolute of the following-described tract or parcel of real estate, situate and being in Sarpy county, in the State and district of Nebraska, all being in township thirteen north of range ten east of the sixth principle meridian, to wit: All of section thirty-three; also the southwest quarter of the southwest quarter of section twenty-seven; also the west one-half of the southeast quarter of the southwest quarter of section twenty-eight; also the west one-half of the northwest
2 quarter and the west one-half of the southwest quarter of section thirty-four; that he is entitled to the possession thereof, and the said defendants unlawfully keep him, the said plaintiff, out of the possession of the same.

The said plaintiff therefore prays a judgment against the said defendants for the recovery of the possession of said real estate and for costs of suit.

THURSTON AND HALL,
Plaintiff's Att'ys.

UNITED STATES OF AMERICA, }
State and District of Nebraska, Douglas County, } *ss:*

John M. Thurston, being duly sworn, says he is the attorney of the plaintiff named in the foregoing petition; that he has read the facts therein stated and believes the same to be true; that said plaintiff is a non-resident of and is now absent from the State of Nebraska, for which reason this verification is made by this affiant.

JOHN M. THURSTON.

Signed in my presence and sworn to before me this 8th day of August, 1883.

[SEAL.] W. F. GURLEY,
Notary Public.

To the clerk of said court:

Please issue summons in above-entitled cause; parties on cause of action as set forth in the above petition.

THURSTON & HALL,
Pl'ff's Attorneys.

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 103 H. U. S. circuit court. Willis M. Sherwood *vs.* Anthony J. Langdon and Michael J. Langdon. Petition. Filed Aug. 18, 1883. Elmer D. Frank, clerk. Thurston & Hall, plaintiff's attorneys.

I hereby become security for costs herein.

3 WILLIAM A. GWYER.
W. A. GWYER, JR.

Security for costs approved Aug. 18, 1883.

ELMER D. FRANK, *Clerk.*

Thereupon, afterwards, to wit, on the 3rd day of September, 1883, answer was filed in said case, which said answer is in words and figures following, to wit:

In the United States Circuit Court, District of Nebraska.

WILLIS M. SHERWOOD

vs.

ANTHONY J. LANGDON and MICHAEL J. LANGDON.

Now come the said defendants, and for answer to the said petition deny that the said plaintiff is seized in fee or otherwise of the premises described in the said petition or is entitled to possession of the lands.

J. M. WOOLWORTH,
Attorney for Defendants.

DISTRICT OF NEBRASKA, *ss:*

Anthony J. Langdon, being duly sworn, says that he is one of the defendants in the above answer, and that the facts stated therein are true, as he verily believes.

A. J. LANGDON.

Subscribed in my presence and sworn to before me this 3rd day of September, A. D. 1883.

[SEAL.] JAMES P. ENGLISH,
Notary Public.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 103, H. In U. S. circuit court, district of Nebraska. Willis M. Sherwood *vs.* Anthony J. Langdon *et al.* Answer. Filed Sep. 3, 1883. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the November term of said court, on the 7th day of December, 1883, the following
4 proceedings were had and done, as appears of record on folio 19, Journal "L" of said court, to wit:

Trial.

WILLIS M. SHERWOOD
vs.
ANTHONY J. LANGDON *et al.* } No. 103. Doc. H.

Now, on this day, come the parties hereto, by their attorneys; also come the following-named persons as jurors, to wit: 1, J. S. Thomas; 2, Wm. Rider; 3, A. M. Holmes; 4, H. D. Merrill; and thereupon, parties agreeing to try said cause to four jurors, said jurors were empaneled and sworn according to law.

And thereupon, after hearing the evidence, argument, and charge of the court, the jury, without leaving their seats, return to the court their verdict, which is in words and figures following, to wit:

WILLIS M. SHERWOOD *vs.* ANTHONY J. LANGDON *et al.*

We, the jury empaneled and sworn to try the issues joined herein, do find that the defendants are seized in fee and entitled to the possession of the premises described in the petition, and that the plaintiff is not seized of any interest therein or entitled to possession thereof.

J. S. THOMAS, *Foreman.*

It is thereupon ordered and adjudged by the court that defendants are seized in fee simple and entitled to the possession of the premises described in the petition herein, and that said defendants have and recover of and from said plaintiff their costs herein expended.

And on motion of Thurston and Hall, attorneys for plaintiff, it is ordered by the court that said verdict and judgment be, and the same is hereby, set aside and a new trial ordered.

5 *Cause Continued.*

Thereupon, afterwards, to wit, on the 5th day of January, 1886, stipulation was filed in said cause, which said stipulation is in words and figures following, to wit:

United States Circuit Court, District of Nebraska.

SHERWOOD
vs.
LANGDON *et al.* } 103, H.

It is hereby stipulated that the parties hereto waive a jury in this cause and agree to try the same before the judge presiding in said

court, and his decision shall have the same force and effect as a verdict.

J. M. WOOLWORTH,
Def'ts' Att'y.
THURSTON & HALL.

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 103 H. U. S. circuit court. Sherwood *vs.* Langdon *et al.* Stipulation. Filed Jan. 5, 1886. Elmer D. Frank, clerk.

Thereupon, afterwards, at the May term of said court, on the 23rd day of May, 1887, the following proceedings were had and done in said cause, as appears of record on folio 116, Journal "M" of said court, to wit:

Cause Submitted.

WILLIS M. SHERWOOD *vs.* ANTHONY J. LANGDON.

This cause *coming* on for trial to the court without the intervention of a jury, trial by jury being waived by stipulation of parties; whereupon, after hearing the evidence adduced and argument of counsel, the court takes said cause under consideration.

6 Thereupon, afterwards, to wit, on the 21st day of July, 1887, findings of the court was filed in said case, which said findings of the court is in words and figures following, to wit:

In the United States Circuit Court, District of Nebraska.

WILLIS M. SHERWOOD
vs.
ANTHONY J. LANGDON and MICHAEL J. LANGDON.

This cause came on to be tried before the undersigned, one of the judges of said court, without a jury, and, after receiving the evidence tendered by the parties upon the trial and considering the same and hearing the arguments of counsel, I do find that the said plaintiff has the legal title in and is entitled to the possession of the real property described in the petition, and that the defendants unlawfully keep him out of the possession of the same.

And I do further find specially that by virtue of the certificate of the register of the United States land office, bearing date August 14th, 1857, showing that John Joseph Wright had located a land warrant under the pre-emption act of 1841 upon the southwest quarter of the southwest quarter of section 28 and the west half of the northwest quarter of section 33, in township 13 north, range 10 east, and that also by virtue of the receiver's certificate of the same date, showing the receipt from the said Wright of forty-five dollars and fifty cents, for lot No. one, quarter of section 33, in township and range aforesaid, the said Wright became seized in fee of the said lands, and that by his deed of conveyance thereof the same passed to the Sauntee Land and Ferry Company.

I do further specially find that by divers conveyances from parties holding the patents from the United States the
7 Sauntee Land and Ferry Company became seized in fee of the west half of the northwest quarter and the west half of the southwest quarter of section 34, and the southwest quarter of the southwest quarter of section 27, and the south half of the southeast quarter and the southeast quarter of the southwest quarter of section 28, and the east half of the northwest quarter and the east half of the southwest quarter of section 33, all in township 13 north, range 10 east; and that by virtue of the bill exhibited in this court by the said plaintiff against the Sauntee Land and Ferry Company and the decree of this court thereon, which are attached to the bill of exception in this cause, the said plaintiff became seized in fee of the said lands and held such title as would support this action.

Upon which special findings my general finding hereinbefore set forth is based.

21 July, 1887.

ELMER S. DUNDY, *Judge.*

Upon the back of said findings appear endorsements in words and figures following, to wit: No. 103, H. Sherwood *vs.* Langdon. Findings of the court. Filed July 21, 1887. Elmer D. Frank, clerk.

Thereupon, afterwards, at the said May term of said court, on the 21st day of July, 1887, the following proceedings were had and done in said cause, as appears of record on folio —, Journal "M" of said court, to wit:

Judgment.

WILLIS M. SHERWOOD
vs.
ANTHONY J. LANGDON and MICHAEL LANGDON. } 103, H.

This cause, having been heard on the pleadings and evidence, was submitted to the court without the intervention of a jury, trial
8 by jury being waived by stipulation of parties; on consideration whereof the court find on the issue joined for the plaintiff, and that said plaintiff is the owner of the land involved in this action, to wit: All of section thirty-three (33); also the southwest quarter of the southwest quarter of section twenty-seven; also the west one-half of the southeast quarter of the southwest quarter of section twenty-eight (28); also the west one-half of the northwest quarter and the west one-half of the southwest quarter of section thirty-four (34), all in township thirteen north of range ten east of the sixth (6th) principal meridian, in Sarpy county, State of Nebraska, and was at the commencement of this suit, and that said plaintiff was then and still is entitled to possession thereof, and that the defendants' claim of title to said land was and is invalid and said defendants were not at the commencement of this action and are not now entitled to the possession of said land. It is therefore ordered

and adjudged by the court that said plaintiff have and recover of and from the said defendants the possession of said lands, together with his costs herein expended, taxed at $—.

Thereupon, afterwards, to wit, on the 21st day of July, 1887, bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

9 In the United States Circuit Court, District of Nebraska.

WILLIS M. SHERWOOD

vs.

ANTHONY J. LANGDON and MICHAEL J. LANGDON.

Be it remembered that at the term of May, 1887, this cause came on to be heard before the Honorable Elmer S. Dundy without a jury, the parties having, by stipulation in writing signed by their respective counsel, waived a jury and agreed to try the same before the said judge, which stipulation was, prior to the trial, filed with the clerk.

And on the said trial, in order to show title in himself, the plaintiff offered in evidence a paper, of which the following is a copy:

"Military boundary land act of March, 1855.

REGISTER'S OFFICE, OMAHA, *August 14th*, 1857.

Military land warrant No. 26653, in the name of Henry Perry Jones, has this day been located by John Joseph Wright upon the S. W. — of S. W. — sec. 28 and W. ½ of N. W. quarter of section thirty-three, in township thirteen N. of range ten E., subject to any pre-emption claim which may be filed for said land within forty days from this date. Contents of land located, 120 acres.

JOHN A. PARKER, *Register*. 1556."

Across the face thereof were written the words, "Pre-emption act, 1841."

To which the defendants objected on the ground that the
10 same was immaterial and irrelevant, and that title could not be shown in this action of ejectment by a register's certificate, and could only be shown by letters patent; which objection was overruled by the court, and to which ruling the said defendants then and there duly excepted; thereupon the said paper was admitted and read in evidence.

Thereupon, further to show his title to the said lands, the said plaintiff offered in evidence the further writing in words and figures following, to wit:

"For value received I, John Joseph Wright, to whom the certificate 1556 was issued, do hereby sell and assign unto Wm. A. Gwyer, president of the Sauntee Land, Town and Ferry Company, and to his heirs and assigns forever the said certificate of location and the

warrant and land therein described, and authorize him to receive a patent therefor.

Witness my hand and seal this 14th day of August, 1857.

JOHN JOSEPH WRIGHT. [SEAL.]

Attest: CYRUS H. DE FOREST, JR.

TERRITORY OF NEBRASKA, *County of Douglas:*

On this 14th day of August, A. D. 1857, before me personally came John Joseph Wright, to me well known, and acknowledged the foregoing assignment to be his act and deed; and I certify that the said John Joseph Wright is the identical person to whom the above-mentioned certificate was issued and who executed the foregoing assignment thereof.

S. L. CAMPBELL, [SEAL.]
Notary Public."

To which the said defendants objected as immaterial and irrelevant on the ground that the same was not and did not purport to be a conveyance of the said lands, and that the same was not duly acknowledged as such; which objection was overruled by the court; to which ruling the said defendants then and there duly ex-
11 cepted, and thereupon the said writing was received and read in evidence.

Thereupon the said plaintiff offered in evidence an act of the legislative Assembly of the late Territory of Nebraska, entitled "An act to incorporate the Sauntee Land and Ferry Company," approved February 13th, 1857, whereby, among other things, it was provided "That a company is hereby incorporated called the Sauntee Land and Ferry Company," and that the said company "may acquire, hold, use, possess, and enjoy the fee simple or other title in or to real estate and personal and mixed property; may sell, convey, pledge, mortgage, or dispose of the same."

Further to maintain the issues on his part the said plaintiff offered in evidence a writing in the words and figures following, to wit:

"No. 757. RECEIVER'S OFFICE AT OMAHA, *August 14th*, 1857,

Received from John Joseph Wright, of Sarpy county, Nebraska, the sum of forty-five dollars and fifty cents, being in full for lot No. one, quarter of section No. 33, in township No. 13 N. of range No. 10 E., containing thirty-six acres and forty-hundredths, at $1.25 per acre.

$45.50. ADDISON R. GILLMORE, *Receiver.*"

Across the face thereof was written the words, "Pre-emption act, 1841."

To which the defendants objected on the ground that the same was immaterial and irrelevant and the title could not be shown in this action of ejectment by a receiver's receipt and could only be shown by letters patent; which objection was overruled by the court;

to which ruling the defendants then and there duly excepted; thereupon the said paper was admitted and read in evidence.

12 Thereupon the said plaintiff offered in evidence the writing in the words and figures following, to wit:

"For value received I, John Joseph Wright, to whom the receiver's certificate No. 757 was issued, do hereby sell and assign unto William A. Gwyer, president of the Sauntee Land and Ferry Company, and to his heirs and assigns forever the said certificate of location and the warrant and land therein described, and authorize him to receive a patent therefor.

Witness my hand and seal this 14th day of August, A. D. 1857.

JOHN JOSEPH WRIGHT. [SEAL.]

Attest: CYRUS H. DE FOREST, JR.

TERRITORY OF NEBRASKA, *County of Douglas:*

On this 14th day of August, A. D. 1857, before me personally came John Joseph Wright, to me well known, and acknowledged the foregoing assignment to be his act and deed; and I hereby certify that the said John Joseph Wright is the identical person to whom the above-mentioned certificate was issued and who executed the foregoing assignment thereof.

S. L. CAMPBELL, [SEAL.]
Notary Public."

To which the said defendants objected as immaterial and irrelevant on the ground that the same was not and did not purport to be a a conveyance of the said lands, and that the same was not duly acknowledged as such; which objection was overruled by the court; to which ruling the said defendants then and there duly excepted, and thereupon the said writing was received and read in evidence.

Thereupon, further to maintain the issues on his part, the said plaintiff offered in evidence a deed of conveyence in due form of law and duly executed and acknowledged, whereby the said John Joseph Wright conveyed to the Sauntee Land and Ferry Company, for the consideration, as therein recited, of three hundred dollars, "all

13 that tract or parcel of land lying and being in the county of Sarpy, Territory of Nebraska, and described as follows, to wit: The southwest quarter of the southwest quarter of section 28, and the west half of the northwest quarter of section 33, and the northwest quarter of the southwest quarter of section 33, township 13 north, range 10 east;" which deed was thereupon admitted and read in evidence.

Thereupon, in order further to maintain the issues on his part, the said plaintiff read in evidence letters patent of the United States to Daniel Kurtz for the west half of the northwest quarter and the west half of the southwest quarter of section 34, township 13 north of range 10 east, and also a deed of conveyance bearing date the 14th of August, 1857, with full covenants of warranty and of title from the said Kurtz to the said Sauntee Land and Ferry Company of the lands last above described.

Further to maintain the issues on his part the said plaintiff read in evidence letters patent of the United States to John Flint of the southwest quarter of the southwest quarter of section 27, and the south half of the southeast quarter and the southeast quarter of the southwest quarter of section 28, township 13 north, range 10 east, and also a deed of conveyance bearing date on the 14th day of August, 1857, whereby the said John Flint duly conveyed to the said Sauntee Land and Ferry Company the lands last above described with full covenants for title and warranty.

Further to maintain the issues on his part the said plaintiff read in evidence letters patent of the United States to James Lanning for the east half of the northwest quarter and the east half of the southwest quarter of section 33, township 13 north, range 10 east, and also a deed in due form of law, duly executed and acknowledged, bearing date the 14th day of August, 1857, whereby the said James Lanning conveyed the said premises to the said Saun-
14 tee Land and Ferry Company with full covenants of warranty and for title.

Further to maintain the issues on his part the said plaintiff offered in evidence the bill in equity exhibited by him in the said circuit court against the Sauntee Land and Ferry Company, a copy whereof is hereto annexed, marked "Exhibit A," and also a decree of the said court upon the said bill, a copy of which is hereto annexed, marked "Exhibit B."

To which bill and decree the said defendants duly excepted on the ground that the same were immaterial and irrelevant, and that thereby no title passed from the said Sauntee Land and Ferry Company to the said plaintiff which could be taken cognizance of upon this trial in this action of ejectment, and that no deed had been made under the said decree; which objection was overruled by the court; to which ruling the said defendants then and there duly excepted, and the said papers were admitted and read in evidence.

The said plaintiff offered no other evidence of title to any of the lands hereinbefore described, save only such as has been stated above.

Forasmuch as the said ruling and orders of the said judge do not appear of record the said defendants pray that this their bill of exceptions may be signed and sealed, which is accordingly done this 21 day of July, 1887.

(Signed) ELMER S. DUNDY, *Judge.*

"EXHIBIT A."

In the Circuit Court of the United States, District of Nebraska.

To the honorable judges of the circuit court for the district of the State of Nebraska:

Willis M. Sherwood, of St. Joseph and a citizen of the State
15 of Missouri, brings this his bill against the Sauntee Land and Ferry Company, a citizen and resident of the State

of Nebraska, and thereupon your orator complains and says that the matter or amount in dispute in the above-entitled action exceeds the sum of five hundred dollars in value, exclusive of costs and interest.

That the said defendant is a corporation organized under the laws of the Territory of Nebraska by a special act of the Legislature, entitled An act to incorporate the Sauntee Land and Ferry Company, approved February 18th, 1857.

That in August, 1857, said respondent was the owner in fee simple absolute of the following-described real estate situate in the county of Sarpy, in the then Territory, now State, of Nebraska, and described as follows, to wit: The east half of the southwest quarter and the northwest quarter of the southwest quarter of section thirty-three (33), the southwest quarter of the southwest quarter and the west half of the southeast quarter of the southwest quarter of section twenty-eight (28), and the southwest quarter of the southwest quarter of section (27) twenty-seven, and the west half of the northwest quarter and the west half of the southwest quarter of section thirty-four, all in town. thirteen north of range ten east of the sixth principal meredian.

That at said time one certain William A. Gwyer was and has ever since been and still is the president and chief officer of said corporation respondent; that at said time, to wit, about the year 1857, said corporation was indebted to various persons to a large amount, the exact amount of which indebtedness is unknown to your orator, but upon information and belief he alleges and charges the same to have been several hundred dollars and more.

That at said time the only property belonging to said respondent was the land aforesaid, which at said time was worth much less than the amount of said indebtedness; that, having no other property and being desirous of settling said indebtedness said, respondent, its officers and stockholders, agreed with said William A. Gwyer that he, the said Gwyer, should take, have, and hold said real estate as his own property, and as consideration for the same should pay off, settle, and discharge said indebtedness.

That no conveyance of said real estate was actually made in writing, as said William A. Gwyer was the president of said corporation and also the grantee to be named in the deed of conveyance; but your orator says said agreement for the sale and conveyance of said real estate was fully consummated. Said Gwyer, in accordance with the terms thereof, paid off, satisfied, and discharged all of the said indebtedness of said corporation, and in his own right as the owner thereof took possession of said real estate and held the same for more than ten years adversely up to the time hereinafter mentioned, paying the taxes thereon and exercising acts of ownership, and remained in the peaceable and quiet possession of said land all of said time.

That on or about the 1st day of December, 1878, the said William A. Gwyer conveyed said real estate, by good and sufficient warranty deed, to William A. Gwyer, Jr., and that said William A. Gwyer,

Junior, on the 5th day of December, 1878, after the execution of the said last-mentioned deed, duly conveyed the said real estate, by good and sufficient warranty deed, to Sarah Hall Gwyer, who has since said time died, leaving no will; that she died intestate, and left surviving her as her sole heirs the following son and daughters, to wit, William A. Gwyer, Junior, Gwendolin Gwyer, Etta Gwyer, and Idalyn H. Yates, by reason of her death, as her sole heirs, the owners in fee of said real estate; that the said heirs were, at the time of her death, all of lawful age, and were and ever since have
17 been in law capable of conveying said real estate.

Your orator further shows to this honorable court that since the decease of said Sarah Hall Gwyer said heirs aforesaid have, by deed of conveyance duly executed, conveyed said real estate to your orator, who is now the sole owner thereof. Your orator says that notwithstanding said facts, and although your orator is in equity the true owner of said real estate, yet he says that by reason of the failure of said respondent to execute the deed of conveyance of said real estate to said William A. Gwyer, Sr., as it had contracted and agreed to do, there is a defect in law in the title of your orator to said real estate; and said respondent, relying upon the same and regardless of the equity and rights of your orator and contrary to good conscience, threatens to bring a suit of ejectment against your orator to oust him from the possession of said property, and will, unless forbid by the decree of this court, as hereinafter prayed, vex and harass your orator by suits at law to recover possession of said real estate, alleging and claiming that it is the legal owner thereof, and that the possession of said William A. Gwyer, Sr., as hereinbefore set forth, was in his capacity as president of said corporation and not in his individual capacity.

And your orator says that said failure of said respondent to execute said conveyance casts a cloud upon the title of your orator and makes it impossible for him to sell the same or make a valid title in law to the same; and your orator says that in good conscience and equity said respondent should convey said real estate to your orator by good and legal conveyance, but said respondent fails, neglects, and refuses so to do, and your orator is remediless in the premises unless relieved by a court of chancery.

Wherefore your orator prays that your orator's bill be taken
18 as true; that it may be adjudged and decreed by this honorable court that your orator is the owner in equity of the said lands and tenements as against the said respondent; that it may be decreed by this court that the said respondent shall, within a reasonable time to be fixed by the court, make to your orator a good and sufficient warranty deed of said lands and tenements, and that in default of such conveyance this decree shall stand as a good and valid conveyance of all right, title, and interest of said respondent in the said lands and tenements to your orator, and for such other and further relief as may be just and equitable in the premises.

And may it please your honors to grant to your orator a writ of subpœna of the United States of America, issuing out of and under

the seal of this honorable court, directed to the said Sauntee Land and Ferry Company, respondent, and commanding, it on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand and to perform and abide such further order, direction, and decree as may be made against it.

THURSTON AND HALL,
Sol's for Complainant.

EXHIBIT B.

In the Circuit Court of the United States for the District of Nebraska.

WILLIS M. SHERWOOD, Complainant,
vs.
THE SAUNTEE LAND AND FERRY COMPANY, Respondent. } 364, G.

This cause coming on to be heard in the presence of counsel for the complainant, and it appearing to the court that the subpœna issued in this cause was duly served upon the respondent, and
19 that the time for appearance by the respondent has long since expired and no appearance has been entered, and it further appearing that on the 7th day of February, A. D. 1883, at a session of this court the default of the respondent was duly entered and an order made that the bill of complaint in the cause be taken as confessed by the respondent—

The court doth order and decree that the bill of complaint in this cause be, and the same is hereby, taken as confessed, and the allegations in said bill contained are by the court found and decreed to be true; and the court doth further find that the complainant, Willis M. Sherwood, is the equitable owner of the following real estate described in said bill of complaint, situate and being in Sarpy county, State of Nebraska, to wit: The northwest quarter and the east one-half of the southwest quarter and the northwest quarter of the southwest quarter of section thirty-three; the southwest quarter of the southwest quarter and the west half of the southeast quarter of the southwest quarter of section twenty-eight (28), and the southwest quarter of the southwest quarter of section twenty-seven (27) and the west half of the northwest quarter and the west half of the southwest quarter of section thirty-four (34), all in town. thirteen north of range ten east of the sixth principal meridian.

That the legal title in and to said real estate is in the respondent, and that said respondent, The Sauntee Land and Ferry Company, now upon the records appears to be the owner in fee simple thereof; that by verbal contract said respondent has sold and conveyed all its title and interest to one William A. Gwyer, who duly paid for and became the sole equitable owner thereof; that said Gwyer remained in adverse possession of said real estate for more than ten years, and that his ownership in and to the same became in equity absolute and complete and wholly divested from said respondent.

20 That by certain mesne conveyance duly executed the complainant has become vested with all the rights, title, and interest in and to said lands so acquired and held by said Gwyer, and is in equity the sole owner thereof, divested from any claim, title, or interest in or to the same of said respondent.

That all the right, title, and interest ever held or acquired in or to said real estate by the said respondent, The Sauntee Land and Ferry Company, has passed to and vested in the said complainant, Willis M. Sherwood, and said respondent ought in equity and good conscience to perfect the title thereto in said complainant by executing and delivering to him a good and sufficient deed of conveyance thereof.

It is further ordered and decreed that the respondent, The Sauntee Land and Ferry Company, shall, within twenty days after the entry of this decree, execute, acknowledge, prove, and record, in the manner provided by law, a good and sufficient deed of conveyance to the complainant of all said real estate, to vest the entire legal title thereof in the respondent, and to deliver said deed of conveyance so executed, acknowledged, proved, and recorded to the complainant.

It is further ordered and decreed that in case said respondent shall fail, neglect, or refuse to make, execute, acknowledge, prove, record, and deliver to the complainant such deed of conveyance within the time hereinbefore fixed, then and in that case this decree shall stand and be a good, sufficient, and complete conveyance from the respondent, The Sauntee Land and Ferry Company, to the complainant, Willis M. Sherwood, of all the right, title, and estate of said respondent in and to said real estate, and shall be taken and held as good, complete, and perfect a deed of conveyance as would

21 be the deed of conveyance hereinbefore specified.

And that the respondent and all persons claiming through, from, or under it be, and they are hereby, perpetually barred, restrained, and enjoined from asserting any right, title, ownership, or interest in or to said real estate adversely to the complainant and from in any manner interfering with the peaceable and quiet possession of complainant in and of the same.

April 9, 1883.

(S'g'd) ELMER S. DUNDY, *Judge.*

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit: No. 103, H. United States c't c't, district of Nebraska. Willis M. Sherwood *vs.* Anthony J. Langdon *et al.* Bill of exceptions. Filed July 21, 1887. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the said 21st day of July, A. D. 1887, a writ of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals:

22 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Willis M. Sherwood, plaintiff, and Anthony J. Langdon and Michael J. Langdon, defendants, a manifest error hath happened, to the great damage of the said defendants in the said cause, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 21 day of July, 1887.

E. D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 103, H. United States circuit court, district of Nebraska. Anthony J. Langdon *et al.*, p'ffs in error, *vs.* Willis M. Sherwood, defendant in error. Writ of error. Filed July 21, 1887. Elmer D. Frank, clerk.

23 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To Willis M. Sherwood, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Anthony J. Langdon and Michael J. Langdon are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 21st day of July, 1887.

ELMER S. DUNDY, *Judge.*

Service of above citation acknowledged this 21st day of July, 1887.

JNO. M. THURSTON,
Att'y for Willis M. Sherwood.

[Endorsed:] No. 103, H. United States circuit court, district of Nebraska. Anthony J. Langdon *et al.*, pl'ffs in error, *vs.* Willis M. Sherwood, defendant in error. Citation. Filed July 21, 1887. Elmer D. Frank, clerk.

24 Thereupon, afterwards, to wit, at the May term of said court, on the 18th day of August, 1887, the following proceedings were had and done in said cause, as appears of record on folio —, Journal " M " of said court, to wit:

WILLIS M. SHERWOOD
vs.
ANTHONY J. LANGDON *et al.* } 103, H.

Now come the parties hereto, by their attorneys, and on motion it is ordered by the court that defendants be, and they are hereby, required to give a supersedeas bond in the sum of two thousand ($2,000.00) dollars.

Thereupon, afterwards, to wit, on the 8th day of Oct., 1887, bond was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents that we, Anthony J. Langdon and Michael J. Langdon, as principals, and Martin Langdon and Louis Lessieur, as sureties, are held and firmly bound unto Willis M. Sherwood in the full and just sum of two thousand dollars, to be paid to the said Willis M. Sherwood and his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between said Anthony J. and Michael J. Langdon, as defendants, and said Sherwood, as plaintiff, judgment was rendered against the said de-
25 fendants, and the said defendants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Willis M. Sherwood, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the second Tuesday of October next:

Now, the condition of the above obligation is such that if the said

Anthony J. Langdon and Michael J. Langdon shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ANTHONY J. LANGDON,
MICHAEL J. LANGDON,
By J. M. WOOLWORTH, *Their Att'y.*
LOUIS LESIEUR.
MARTIN LANGDON.

Approved by—
ELMER S. DUNDY, *Judge.*

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 103, H. United States circuit court, district of Nebraska. Willis M. Sherwood *vs.* Anthony J. Langdon *et al.* Bond. Filed Oct. 8, 1887. Elmer D. Frank, clerk.

26 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

By virtue of the foregoing writ of error and in obedience thereto I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth judicial circuit, do hereby certify that the foregoing folios, from one to twenty-six, contain true and faithful transcripts of all pleadings and proceedings of record and on file in my office as said clerk in the case of Willis M. Sherwood, plaintiff, *vs.* Anthony J. Langdon *et al.*, defendants, and that a copy of the writ of error and citation has been lodged and remains in my said office.

Witness my hand and the seal of said circuit court, at Omaha, this 10th day of October, 1887.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 1301. Anthony J. Langdon and Michael J. Langdon, plaintiffs in error, *vs.* Willis M. Sherwood. Filed November 15, 1887.

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Supreme Court of the United States.

ANTHONY J. LANGDON, *et al.*,

Plaintiffs in Error,

vs.

WILLIS M. SHERWOOD.

BRIEF, ASSIGNMENT OF ERROR AND POINTS FOR PLAINTIFFS IN ERROR.

J. M. WOOLWORTH,

ATTORNEY FOR PLAINTIFFS IN ERROR.

F. A. Manger, Printer, 1402 Farnam St. Omaha.

Supreme Court of the United States.

ANTHONY J. LANGDON, *et al.*,

Plaintiffs in Error,

vs.

WILLIS M. SHERWOOD.

BRIEF, ASSIGNMENT OF ERROR AND POINTS FOR PLAINTIFFS IN ERROR.

This is a writ of error to the Circuit Court of the United States for the District of Nebraska. It was an action of ejectment brought by the defendant in error against the plaintiffs in error.

The case was tried before the Honorable Elmer S. Dundy, District Judge, sitting in the Circuit Court, without a jury, the parties having entered into a stipulation waiving a jury, which was duly filed with the clerk.

Supreme Court of the United States.

ANTHONY J. LANGDON, *et al.*,

Plaintiffs in Error,

vs.

WILLIS M. SHERWOOD.

Brief, Assignment of Error and Points for Plaintiffs in Error.

This is a writ of error to the Circuit Court of the United States for the District of Nebraska. It was an action of ejectment brought by the defendant in error against the plaintiffs in error.

The case was tried before the Honorable Elmer S. Dundy, District Judge, sitting in the Circuit Court, without a jury, the parties having entered into a stipulation waiving a jury, which was duly filed with the clerk.

A bill of exceptions was saved, in which it appears that the plaintiff below, in order to show title in himself, offered in evidence the certificate of the Register of the United States Land Office, at Omaha, bearing date on the 14th of August, 1857, showing the location of a military land warrant by John Joseph Wright, upon the southwest quarter of the southwest quarter of section twenty-eight, and the west half of the northwest quarter of section 33, in township 13 north of range 10 east. To which the defendants objected on the ground that title could not be shown in an action of ejectment by a Register's certificate, but could only be shown by letters patent. The objection was over-ruled, and exception duly taken. The paper was read in evidence.

The plaintiff, for the same purpose, offered in evidence the receipt of the Receiver of the same land office, of the same date, of $45.50, from John Joseph Wright, for lots one quarter of section thirty-three, in the same township and range. The same objection was made and over-ruled and exception taken. Wright conveyed to the Sauntee Land and Ferry Company.

The plaintiff also read in evidence letters patent to Daniel Kurtz of the west half of the south-west quarter, and the west half of the south-west quarter of section thirty-four, in the same township and range, and the deed of conveyance of the same lands by Kurtze to the said Company; also, letters patent to John Flint, of the south-west quarter of the south-west quarter of section twenty-seven, and the south half of the south-east quarter and the south-east quarter of the south-west quarter of section twenty-eight, in the same township and range, and Flint's deed to the same company, conveying the last above described lands; also letters patent to James Lanning for the east half of the north-west quarter, and the east half of the south-west quarter, of section thirty-three, in the same township and range, and Lanning's deed to the same company, conveying the last above described lands.

In order to show title from the company to himself in the said lands, the plaintiff offered in evidence a bill in equity filed in the said Circuit Court by him against that company, alleging a verbal contract on its part to convey the same to him, and a decree entered upon an order taking the bill as confessed, finding the plaintiff to be the

equitable owner of the land, that the legal title was in the company, which had made a verbal contract for its sale, and that the said company within twenty days after its date convey the premises to him; but if it failed to do so, "then and in that case this decree shall stand and be a good, sufficient and complete conveyance from the respondent, the Sauntee Land and Ferry Company, to the complainant, Willis M. Sherwood, of all the right, title and estate of the said respondent in and to said real estate, and shall be taken and held as good, complete and perfect a deed of conveyance as would be the deed of conveyance hereinbefore specified." To which bill and decree severally the defendants duly objected, on the ground that they could not be taken cognizance of in this action of ejectment, and that no deed had been made in pursuance of the said decree. Which objection was overruled, and the defendant duly excepted, and the papers were admitted and read in evidence.

The learned judge before whom the cause was tried, found generally for the plaintiff, and also specially that by the Register's certificate and Receiver's receipt above mentioned, and the deed of Wright to the said company, title passed to it;

and also that the title of the patentees above named, having become vested in the said company, by virtue of the decree against it, the plaintiff became seized in fee of the lands above mentioned, and he held that such title would support this action. And he stated therein, that his general finding was based upon these special findings. Thereupon judgment was entered for the plaintiff.

ASSIGNMENT OF ERRORS.

1. The court erred in receiving in evidence the certificates of the Register and Receiver of the land office.

2. The court erred in receiving in evidence the decree in favor of the plaintiff against the Sauntee Land and Ferry Company.

3. The court erred in finding specially, that by virtue of the certificates of the Register and Receiver, and conveyances from the parties mentioned therein, the plaintiff became seized of an estate in the lands in question which would support this action.

4. The court erred in finding specially, that by virtue of the decree above mentioned the

plaintiff became seized of a title which would support this action.

5. The court erred in finding for the plaintiff upon the said special findings.

FIRST POINT.

The certificates of the Register and Receiver of the local land office were incompetent to show title in the plaintiff below, and the judge erred in receiving them in evidence and finding that they showed a title of which he could take cognizance in this action.

The principle is elementary and of general application, except where modified by statute, that in an action of ejectment a legal title must be established, in contradistinction to an equitable title, in order to entitle the plaintiff to recover; and that in such action evidence of an equitable title is inadmissible. It has been held by this court in a long series of cases, that a title resting upon an entry in the United States Land Office, if not supported by a patent, is equitable; and that a legal title is shown only by the patent. Until the issue of the patent, the government holds

the legal title; the party making the entry, or his assignee, holds the equitable title; consequently in ejectment, evidence of the entry is inadmissible.

One of the earliest cases is *Bagnell vs. Broderick*, 13 Pet. 436. The plaintiff showed title, by patent, to John Robertson, Jr., from whom he traced title to himself.

The patent recited the location upon the premises in dispute by Robertson upon a New Madrid certificate. The defendant traced title from Morgan Byrne. He showed that the lands injured by the earthquake, on account of which the certificate was issued, had come to him from Robertson, and that a certificate had been issued to him, which he located on the premises in dispute. Thus the question was raised between the grantee of the patentee and the grantee of the locator of the certificate, to whom a patent had not issued.

Mr. Justice Catron delivered the opinion of the court. He said: "Congress has the sole power to declare the dignity and effect of titles eminating from the United States; the whole legislation of the federal government in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; until its issuance

the fee is in the government, which by the patent passes to the grantee; and he is entitled to recover the possession in ejectment."

Fenn vs. Holme, 21 How. 481, was an ejectment, in which the plaintiff showed title by the location of a New Madrid certificate upon the premises in question. But neither party held a patent. Mr. Justice Daniel, in the course of an elaborate opinion, in which he pointed out the fundamental distinction between legal and equitable remedies in the Federal Court, said: "This is an attempt to assert at law and by a legal remedy, a right to real property——an action of ejectment to establish the right of possession in land. That the plaintiff in ejectment must in all cases prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an equitable estate will not be sufficient for a recovery, are principles so elementary and so familiar to the profession as to render unnecessary the citation of authority in support of them." After pointing out the fact that no patent had been issued, and that the plaintiff in the Circuit Court founded his claim exclusively and solely upon the New Madrid warrant, he says, at page 488: "The inquiry then presents itself as to who holds the legal title to

the land in question. The answer to this question is, that the title remains in the original owner, the Government, until it is invested by the Government in its grantee. This results from the nature of the case, and is the rule affirmed by this court in the case of *Bagnell et al. vs. Broderick.*" The learned judge then cites the passage quoted above. He then goes on to say: "A practice has prevailed in some of the States (and among them the State of Missouri), of permitting the action of ejectment to be maintained upon warrants for land, and upon other titles not complete or legal in their character; but this practice, as was so explicitly ruled in the case of *Bennett vs. Butterworth,* 11 How., can in no wise affect the jurisdiction of the courts of the United States, who, both by the Constitution and by the acts of Congress, are required to observe the distinction between legal and equitable rights, and to enforce the rules and principles of decisions appropriate to each."

Hooper vs. Scheimer, 24 How. 235, was also an ejectment, brought upon a pre-emption entry upon which a patent had not issued. Mr. Justice Catron, after reciting an act of Arkansas which authorized a plaintiff to maintain ejectment upon an entry with the Register and Receiver, and also the pas-

sage above quoted from the judgment of the court in *Bagnell vs. Broderick,* says: "But there is another question standing in advance of the foregoing, to-wit: Can an action of ejectment be maintained in the Federal Courts against a defendant in possession on an entry made with the Register and Receiver? It is also the settled doctrine of this court that no action of ejectment will lie on an equitable title, notwithstanding a State legislature may have provided otherwise by statute. The law is only binding on the State Courts, and has no force in the Circuit Courts of the Union. *Fenn vs. Holme,* 21 How. 482."

Clagett vs. Kilbourne, 1 Black 346, was an action of ejectment in which the plaintiff did not show a patent from the Government. Mr. Justice Nelson, delivering the opinion of the court, says at the bottom of page 349: "It is proper to add, even if an equitable title had been acquired, it would not have helped him, as it will not sustain an ejectment in the Federal Courts. 23 How. 235, 249; 21 Ib. 481." See also *Foster vs. Mora,* 98 U. S. 425, and *Simmons vs. Ogle,* 105 Ib. 271.

SECOND POINT.

The decree of the Circuit Court for Nebraska was incompetent to show title in the plaintiff below, and the court erred in receiving in evidence the decree and the bill upon which it was rendered, and taking cognizance thereof in his finding and judgment.

The reason for the rule violated by the judge in receiving these papers in evidence, is the same as that upon which the rule stated under the first point rests, namely: that evidences of an equitable title are inadmissable in an action of ejectment.

So this court decided in the *Lessee of Hickey vs. Stewart,* 3 How. 750. The action was ejectment. The plaintiffs showed a patent to James Mather, and that they were his heirs. The defendants traced title to themselves from the heirs of Robert Starke. They were permitted to read in evidence the record of proceedings in a suit in chancery, in the Supreme Court of the State of Mississippi, in which the heirs of Starke were plaintiffs and the heirs of Mather were defendants. This record contained a decree finding "that the title of the defendant was obtained by fraud and force and violence against the equity of the complainants'

ancestor. * * * It was therefore ordered, adjudged and decreed that the title of defendants to said tract of land be and the same is hereby declared to be fraudulent and void as against the complainants," and that the defendants shall deliver to the complainants the full, peaceable and actual possession of said lands, (see argument of Henderson, page 752) and "convey the land to the complainants" and "awarded the writ of *habere facias,* 'which writ the court of chancery was authorized to order by a statute of the State.' " (See opinion, page 759) Under this writ the defendants were placed in possession.

Mr. Justice McKinley, speaking of the effect of the decree upon the legal title, says on page 759: "The court by its decree established the right of the complainants to the land in controversy, and ordered Mather's heirs, who were all non-residents of the State of Mississippi, to convey the land to the complainants, and to deliver to them the possession, and awarded the writ of *habere facias;* which writ the court of chancery is authorized to order by a statute of the State. Without the aid of this writ the court could not have put the complainants into possession, the defendants being out of their jurisdiction; nor could they, for the same reason,

compel a conveyance to the title to the land. The decree is, therefore, if not otherwise valid, nothing more than an equitable right, ascertained by the judgment and decree of a court of chancery; and until executed by a conveyance of the legal title, according to the decree, Starke's heirs and those claiming under them have nothing but an equitable title to the land in controversy."

The defendant in error seeks to escape the rule laid down in the above case by citing section 429 of the Code, (Compiled Statutes 585) which is as follows: "When any judgment or decree shall be rendered for a conveyance, release or acquittance in any court of this State, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformable to such judgment or decree."

But this section does not give to a decree the effect of a conveyance of the legal title. It does not say that it shall operate as a conveyance or be available as a conveyance, but only that its operation and effect shall be preserved, although a

conveyance be not made. The language is, "it shall have the same operation and effect and be as available as if the conveyance" had been executed. Its object was to preserve in force the judgment or decree, notwithstanding the failure to make the deed, and thus preserve it, although the decree would otherwise by lapse of time become dormant.

The contention of the defendant in error would have some foundation if the language were, that the decree should operate as a deed to transfer the legal title from the party against whom it was made to the party in whose favor it was made. But that was not within the contemplation of the legislature. It did not mean to give the decree such effect. All that the statute provides is, that the decree shall be in force and effect after the expiration of the time limited for the making of the deed.

The statute, therefore, does not take the case out of the rule, that a decree in equity directing the defendant therein to execute a deed, establishes only an equitable title, which will not support an ejectment.

J. M. WOOLWORTH,

Attorney for Plaintiffs in Error.

124-74

SUPREME COURT U.S.
FILED
DEC 9 1887
JAMES H. McKENNEY,

IN THE

SUPREME COURT

OF THE UNITED STATES.

ANTHONY J. LANGDON, ET AL.,
Plaintiff in Error,

vs.

WILLIS M. SHERWOOD,
Defendant in Error.

Brief for Defendant in Error.

BY JOHN M. THURSTON,
of Counsel.

Omaha Republican Print.

IN THE

SUPREME COURT

OF THE UNITED STATES.

ANTHONY J. LANGDON, et al.
Plaintiff in error

vs.

WILLIS M. SHERWOOD,
Defendant in error.

BRIEF FOR DEFENDANT IN ERROR.

This cause was tried to the court, and the Judgment in the case is based upon findings of fact, set forth in the record, pages 4 and 5. An inspection of the petition and the findings of the court, will readily show, that the plaintiff in the court below claimed title to section 33 and parts of sections 27, 28 and 34 all in township 13 north of range ten east. The court finds that the title to *all* of the property described in the petition is in the

plaintiff, Willis M. Sherwood; and, so far as the title to the east half of section 33 is concerned, it will be seen, upon examination of the bill of exceptions and the findings of the court, that no question is made by the plaintiff in error as to the sufficiency of the title produced by Sherwood. I insist therefore that in any event the judgment, so far as the east half of that section is concerned, should stand. For I take it to be true that a judgment in ejectment, based upon findings by the court, will not be wholly set aside if those findings are sufficient to entitle the party, in whose favor they are, to possession of any certain portion of the land in controversy.

Second. The land certificates shown in the bill of exception, on pages six and seven of the printed record, were only for the southwest quarter of the southwest quarter of section 28 and the west one-half of the northwest quarter of section 33, being 120 acres: and for lot No. 1, quarter of Sec. 33, being the fractional part of the northwest quarter of the southwest quarter of said section 33, containing thirty-six acres and forty one-hundredths.

From this the court will see that the title of the plaintiff, so far as it rests upon the certificates of the land office, which are objected to, only goes to one hundred andfifty-six and forty-one-hundredths acres of the 820 in controversy. The record shows for the defendant in the court below, no color of title in any of the land. As a matter of fact none was even claimed. Upon that trial it was supposed, by counsel for plaintiff, and it was held

by the court, that Section 411, of the Nebraska Code of Civil Procedure, was sufficient to authorize the receipt of those certificates in evidence to show a *prima facia* title in the plaintiff. That section is as follows: "The usual duplicate receipt of the receiver of any land office or if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver, that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent."

The case of Bagnell vs. Broderick, 13 Peters 436, cited by the plaintiff in error, does not, it seems to me, support the claim urged by opposing counsel. The holding in that case is that a certificate of the land office cannot be used to maintain title in ejectment against an averse claim under a patent; and the court in that case says: "Nor do we doubt the power of the state to pass laws authorizing purchasers of land from the United States to prosecute actions of ejectment against trespassers on the land purchased." Is not this such a case?

I am aware of the fact that the decision in Hooper vs. Scheimer, 24th Howard, 235, tends to support the claim of counsel for plaintiff in error. It seems to hold that the title, shown by the production of the land office certificate, is only equitable, and will not support an action in ejectment. But in all cases cited, the parties holding the land office certificate, were seeking to defeat patents

subsequently issued, or at least were attempting to oust from possesion those claiming under some adverse legal title.

I do not challenge the correctness of the holdings of this court upon this question, but I may be permitted to suggest that the rule laid down in Bagnell vs. Broderick goes far enough, and it should not be enforced in favor of mere naked possession.

However, I do not apnrehend that the judgment in this case would be reversed in toto because of a failure of proof of title to a small portion of land in controversy.

Third. The plaintiff, in the court below, in order to establish his chain of title to all the land, except the east half of section 33, which, as already stated, came to the plaintiff by direct chain of title unquestioned and unobjectionable, offered in evidence a decree of the Circuit Court of the District of Nebraska, in a cause brought by Willis M. Sherwood against the Sauntee Land & Ferry Company, in which decree the court found "that the right, title and interest of the Sauntee Land & Ferry Company had passed to, and vested in, the complainant in the case;" and it was further decreed, "that said Land & Ferry Company should within twenty days execute, acknowledge, approve and record, in the manner provided by law, a good and sufficient deed of conveyance to the complainant of all of said real estate, to vest the entire legal title thereof in him, and to deliver said deed of conveyance to the complainant." The Court further decreed, "that in case said

respondent shall fail, neglect or refuse to make, execute or acknowledge, approve, record and deliver to the complainant such deed of conveyance within the time hereinbefore fixed, then and in that case this decree shall stand and be a good, sufficient and complete conveyance from the respondent, the Sauntee Land & Ferry Company to the complainant, Willis M. Sherwood, of all the right, title and estate of said respondent in and to said real estate, and shall be taken and held as good, complete and perfect a deed of conveyance as would be the deed of conveyance hereinbefore specified." The bill of complaint alleged that the complainant therein named, Willis M. Sherwood, was in possession of the land at the time it was filed, and the action was brought not to recover possession of the premises, but to perfect the legal title of the complainant, in possession under equitable title.

I insist that this decree perfected the legal title in Willis M. Sherwood. The case cited by opposing counsel is not in any manner similar to the one at bar.

Lessees etc., of Hickey vs. Stewart, 3d Howard, 750.

In that case there was no provision in the decree itself, that upon failure of the respondent to execute a conveyance the decree itself should stand in all respects as such conveyance.

A court of equity has the undoubted right to so decree.

The record of a judgment constitutes a perfect link in

a chain of title, and can be introduced in an action of law to prove title.

Freeman on Judgments, second edition, Sec. 416.
3d Conn., 90.

So a decree in Chancery may be given in evidence on the same footing as a judgment at common law.

Freeman on Judgments, second edition, Sec. 420.

I insist that the Nebraska statute, cited by opposing counsel, was enacted for the express purpose of giving to a decree of a court of Chancery the same effect, so far as the conveyance of the legal title to the land is concerned, as would the execution and delivery of the conveyance as decreed. If this was not the intention of that statute it is difficult to conceive for what purpose it was enacted. If such decree "shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformable to such judgment or decree," then certainly, the party in whose favor such decree is rendered, can use the decree to maintain his legal title in all legal proceedings, with the same effect as he could have used the conveyance itself. For the above reasons the judgment of the court below should be affirmed, or, in any event, it should be affirmed as to all the property in controversy, except that described in the two land certificates.

JOHN M. THURSTON,
Of Counsel.